

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

74-1243

United States Court of Appeals
FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

—against—

HOWARD R. HUGHES, HUGHES TOOL
COMPANY AND RAYMOND M. HOLLIDAY,

Defendants-Appellants.

**REPLY BRIEF FOR DEFENDANTS-APPELLANTS
HUGHES TOOL COMPANY AND
RAYMOND M. HOLLIDAY**

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TWA's brief on this appeal comes down to the contentions that no reviewable issue is presented to this Court and that, even if a reviewable issue is presented, the District Court did not abuse its discretion in disallowing costs of obtaining a stay of the judgment that the Supreme Court reversed. Both these contentions are without merit.

POINT I

An Order Disallowing Certain Items of Cost Is Reviewable for an Abuse of Discretion.

The issue on this appeal is whether the District Court abused its discretion in disallowing costs that Hughes Tool Company ("Toolco") incurred in obtaining a stay pending appeal to this Court and review by the Supreme Court. As pointed out in our initial submission, the District Court

acted in a totally arbitrary manner in allowing certain of these costs and disallowing others. No rational basis exists to support its action.

The issue thus presented is one reviewable by this Court. As stated in 6 Moore's, *Federal Practice*, ¶ 54.70[5]:

"An appeal will not lie from a judgment upon the issue of costs alone, nor where all issues except costs are moot, unless the power of the trial court to assess particular items as costs is in issue or there has been an abuse of discretion. Where the District Court's allowance, disallowance or apportionment of costs involves discretion, as distinguished from power, an appellate court normally will not interfere; but will do so where discretion has been abused." (Emphasis supplied)

*See, also, 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2668 (1973).*

In *Nuzzo v. Rederi A/S Wallenco, Stockholm, Sweden*, 325 F.2d 994, 995 (2d Cir. 1963) this Court was presented with an appeal based solely on the question whether the lower court abused its discretion in denying the recovery of expenses that the defendant had incurred in bringing its only witness from Sweden to testify at trial. This Court reversed and awarded the defendant the round trip air fare it expended in bringing the witness to the trial. The Court stated at page 995 of its decision:

"We hold the denial of the reasonable expense of bringing Lundquist [the witness] to the trial to have been an abuse of discretion."

In *McDonnell v. American Leduc Petroleum, Inc.*, 456 F.2d 1170, 1188, (2d Cir. 1972), this Court again demon-

strated that it had jurisdiction to hear a claim for costs in light of the allegation that the District Court had abused its discretion in denying specific costs. This Court stated at p. 1188:

"We affirm. It is well-settled that under Fed. R. Civ. P. 54(d), the awarding of costs is discretionary with the trial judge. See *Oscar Gruss & Son v. Lumbermens Mut. Cas. Co.*, 442 F.2d 1278, 1284-1285 (2d Cir. 1970); *Syracuse Broadcasting Corp. v. Newhouse*, 319 F.2d 683, 690 (2d Cir. 1963). * * * In this case, we are not persuaded that the trial court's denial of costs to the exonerated defendant Szabo constituted an abuse of discretion."

The language of the decision makes clear that if this Court had been persuaded that the trial court had abused its discretion it would have awarded the costs that the lower court had denied. *See, also, Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970).

In this case, the abuse of discretion lies in the District Court's disallowing as items of cost amounts necessarily expended by Tooleo pursuant to the terms of the District Court's stay order, even though the District Court recognized that other costs of obtaining a stay were properly taxable.

POINT II

The District Court Abused Its Discretion in Not Allowing Toolco All of Its Costs in Obtaining the Stay.

TWA, in an attempt to set the clock back four years, now claims that other forms of security which it suggested to secure its judgment would have been less costly than the costs incurred by Toolco in having had quarterly audits performed and that, therefore, the District Court did not abuse its discretion in disallowing as costs expenditures required to furnish these audits to TWA pursuant to the order of the District Court. This *nunc pro tunc* approach totally ignores the reality of the situation existing in May and June of 1970 at the time the District Court attempted to fashion a remedy whereby TWA's judgment would be secured, while Toolco would not be financially crippled by the Court's remedy.

The District Court, in its order of June 10, 1970, recognized that Toolco could not obtain the usual supersedeas bond. It stated:

". . . I fully appreciate that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practical under the circumstances."
(App. 80a)

Accordingly, the District Court fashioned a remedy whereby Toolco was required to post \$75 million which, by order of June 25, 1970 (App. 104a-105a), was permitted to be placed in the form of a Letter of Credit. The remaining \$86,447,686.59 balance of the judgment was to be secured by the maintenance of Toolco's net worth at three times the amount of this balance. The Court went on to say that "The details of this arrangement shall be worked out

between counsel." (App. 81a). In the intervening six days between the Court's opinion and that of its order of June 16, 1970 counsel for both TWA and Toolco agreed that Toolco would have quarterly audits performed in order to give comfort to TWA; comfort TWA originally requested on May 11, 1970 (App. 27a, 28a).

It is no answer to the arbitrary disallowance of the costs of the quarterly audits to say that if Toolco's stockholder had done something or other, then perhaps TWA would not have wanted the quarterly audits. Mr. Hughes was not a party to the action and was not subject to the jurisdiction of the District Court. And, in any event, the suggestion was not adopted by the District Court.

Moreover, the District Court did not rest its decision on this ground. Rather, it stated (App. 201a-202a) that since defendant "needed and was using millions of dollars" in various enterprises, "it should bear the cost of allowing business to go on as usual." This is the arbitrary determination that it made. As stated in Toolco's main brief, the entire purpose of a stay is to permit a party to obtain review without being crippled in its business.

POINT III

The Security Interest Created in Favor of Bank of America for Securing the Letter of Credit Was Solely for Such Purpose and for No Other Reason.

TWA, in its brief, takes the untenable position that the \$66,040.40 that Toolco paid to Bank of America to fulfill Bank of America's condition precedent to issuing its Letter of Credit also constituted security for "any other obligations" that Toolco may have had to the bank and, indeed, implies that such security was used to secure "other obligations." The Bank of America, through its Vice President, John D. Cawley, has stated under oath that "the fee charged was exclusively and solely for the issuance of the indicated Letter of Credit and for no other purpose." (App. 175a). In addition, Mr. Cawley goes on to state that:

"(4) A condition precedent to the issuance of the letter of credit was that it be secured by Hughes. A part of the security was the proceeds from a real estate loan granted against a recorded deed of trust on properties owned by Hughes, principally located in Culver City, California. In conjunction with the preparation and documentation of that real estate loan, Hughes paid the Bank a fee of \$12,500 and, in addition, paid \$53,488.80 which was in turn remitted to the Title Insurance and Trust Company to pay the billing for its issuance of a title policy, plus \$51.60 to the Los Angeles County Recorder for the recordation of the indicated deed of trust." (App. 175a)

As the foregoing sworn statements clearly demonstrate, there were no "other obligations" being secured by the real estate loan granted by Bank of America. For TWA to imply anything to the contrary is, at best, just so much rhetoric and simply not the truth.

CONCLUSION

For the reasons set out here and in our initial brief, this appeal should be granted in all respects and the case remanded to the District Court with instructions to grant \$683,805 in additional costs to Toolco.

Respectfully submitted,

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June 26, 1974



Service of 3 copies of this within
10 days is admitted this
26 day of June 1974

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